[6450-01-P]

DEPARTMENT OF ENERGY

10 CFR Part 707

[EH-RM-19-WSAP]

RIN 1992-AA60

Workplace Substance Abuse Programs at DOE Sites

AGENCY: Office of Environment, Health, Safety and Security; U.S. Department of Energy.

ACTION: Final rule.

SUMMARY: On September 7, 2021, the U.S. Department of Energy (DOE or the Department) published a notice of proposed rulemaking (NOPR) for public comment in which it proposed to amend its regulations on contractor workplace substance abuse programs at DOE sites. In this final rule, DOE is adopting the amendments proposed in the NOPR without change. The amendments decrease the random drug testing rate for individuals in certain testing designated positions (TDPs); clarify that all positions requiring access authorizations (security clearances) are included in the TDPs; and clarify requirements for DOE approval prior to allowing persons in certain TDPs to return to work after removal for illegal drug use.

DATES: This rule is effective [**INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER***].

FOR FURTHER INFORMATION CONTACT: Ms. Moriah Ferullo, U.S. Department of Energy, Office of Environment, Health, Safety and Security, EHSS-11, 1000 Independence Avenue, SW, Washington, DC 20585; (301) 903-0881 or by email at: *moriah.ferullo@hq.doe.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to DOE's statutory authority, including the Atomic Energy Act of 1954, as amended (AEA), and the Drug-Free Workplace Act of 1988, DOE promulgated a rule on July 22, 1992 (57 FR 32652), establishing minimum requirements for DOE contractor workplace substance abuse programs. The rule provided for drug testing of contractor employees in, and applicants for, TDPs at sites owned or controlled by DOE and operated under the authority of the AEA. The Department determined that possible risks of serious harm to the environment and to public health, safety, and national security justified the imposition of a uniform rule establishing a baseline workplace substance abuse program, including drug testing. The rule created a new part 707 of Title 10 in the Code of Federal Regulations (CFR) entitled *Workplace Substance Abuse Programs at DOE Sites*.

On September 14, 2007, the Secretary of Energy (Secretary) issued a memorandum addressing drug testing for DOE positions that require access authorizations (security clearances). The memorandum stated the Secretary's determination that all Federal and contractor positions that require security clearances, and all employees in positions that currently have security clearances, have the potential to significantly affect the environment, public health and safety, or national security. The Secretary determined that all such positions would be considered to be TDPs, which means they are subject to applicant, random, and "for cause" drug testing. The Secretary further determined, with regard to random drug testing, that employees in TDPs, other than those designated to be included in the 100 percent annual sample pool

(primarily employees in the Human Reliability Program), be tested at a 30 percent annual sample rate. To implement the memorandum's provisions regarding TDPs for DOE contractor employees, the Department issued a final rule at 10 CFR part 707. *See* 73 FR 3861 (Jan. 23, 2008). However, the 2008 final rule contained incorrect section references. Whereas 10 CFR 707.7(a)(2) states that positions identified in paragraph (b)(3) of this section shall provide for random tests at a rate equal to 30 percent of the total number of employees in TDPs for each 12-month period, the correct reference should have been to paragraphs (b)(2) and (b)(3). Furthermore, the second sentence of 10 CFR 707.7(a)(2), 10 CFR 707.7(b)(2)(iii), and the second sentence of 10 CFR 707.14(e) each contain an incorrect reference to paragraph (b)(2) of 10 CFR 707.7. Since TDPs identified in paragraph (b)(2) should be tested at a 30 percent annual sample rate and do not require DOE approval for return to work after illegal drug use, there should not have been references to "(b)(2)" in the second sentence of 10 CFR 707.7(a)(2); in 10 CFR 707.7(b)(2)(iii); and in the second sentence of 10 CFR 707.14(e).

On September 7, 2021, the Department published a Notice of Proposed Rulemaking (NOPR) proposing to correct these errors (86 FR 49932). In the NOPR, the Department proposed that the second sentence of 10 CFR 707.7(a)(2) would state that employees in the positions identified in paragraphs (b)(1) and (c) of this section will be subject to random testing at a rate equal to 100 percent of the total number of employees identified, and those identified in paragraphs (b)(1) and (c) of this section may be subject to additional drug tests. DOE further proposed to replace the reference to (b)(2) with (c) in 10 CFR 707.7(b)(2)(iii). In the second sentence of 10 CFR 707.14(e), DOE proposed deleting the reference to 10 CFR 707.7(b)(2). DOE also proposed in the NOPR to add a new requirement at 10 CFR 707.7(b)(2)(vi) to specify that access authorization (security clearance) holders will be tested. DOE proposed that the new subsection would refer to all other personnel in positions that require an access authorization (security clearance), other than those identified in paragraphs (b)(1) and (c) of this section. As a result of this change, DOE intends that employees identified in 10 CFR 707.7(b)(2)(vi) would be tested at

a rate equal to 30 percent of the total number of employees identified in paragraphs (b)(2) and (b)(3) of 10 CFR 707.7 for each 12-month period, if they are not also identified in 10 CFR 707.7(b)(1) and (c). Employees identified in 10 CFR 707.7(b)(1) and individuals, whether or not employees, identified in 10 CFR 707.7(c) would be tested at a rate equal to 100 percent of the total number of employees or individuals, as applicable, identified for each 12-month period, and may be subject to additional drug tests.

By publication of this final rule in the *Federal Register*, DOE is incorporating the changes proposed in the NOPR into 10 CFR part 707.

II. Authority

This final rule continues to establish minimum requirements for the workplace substance abuse programs for DOE contractors and their employees, and is promulgated pursuant to DOE's authority under section 161(i)(3) and (p) of the AEA to prescribe such regulations as it deems necessary to govern any activity authorized by the AEA, including standards for the protection of health and minimization of danger to life or property (42 U.S.C. 2201(i)(3) and (p)) and section 8102 of the Drug Free Workplace Act of 1988, as amended (41 U.S.C. 8102).

III. Discussion of Public Comments

The Department's NOPR invited public comments on the proposal and provided a 30-day public comment period that ended on October 7, 2021. This section responds to the comments the Department received. It also contains an explanation of certain final rule provisions in order to provide interpretative guidance to DOE offices and DOE contractors that must comply with this final rule.

The Department received two general comments (Ex. 1, 2) regarding the proposed changes to the rule. One commenter (Ex. 1) stated that the workplace substance abuse programs proposed rule was significant because DOE employees and contractors who have security clearances have

the ability to affect the environment, public health and safety, and national security, and testing these individuals to make sure that they are not in any way distracted or under another influence is imperative for DOE's mission to continue unimpeded. A second commenter (Ex. 2) stated that implementing substance abuse programs at the DOE sites is a good idea and monitoring employees through drug tests will keep the sites clean and prevent accidents from happening.

The Department agrees with the commenters and believes that requiring a workplace substance abuse program at its sites will assist in maintaining a workplace that is free from the use of illegal drugs and creates a safe and healthy workplace for employees at DOE sites.

One commenter (Ex. 2) stated that some drugs should not be included in the drug tests since some people use them for beneficial reasons. DOE notes that this comment is beyond the scope of the amendments proposed in the NOPR.

The Department received one comment (Ex.1) regarding the proposed 30 percent testing rate for employees in positions identified in paragraphs (b)(2) and (b)(3) of 10 CFR 707.7. The commenter believes that DOE should take additional measures to reinforce the idea that there is a zero-tolerance policy for substance abuse and that the work being conducted should not be conducted by individuals who cannot abide by the rules. The commenter suggested that increasing the size of the annual sample rate from 30 percent would be one such additional measure that would be beneficial to the Department. However, the commenter did not suggest an alternative rate.

DOE has determined that the 30 percent testing rate is: (1) consistent with the 2007 Secretarial memorandum; (2) consistent with the testing rate for DOE Federal employees with security clearances; and (3) appropriate for DOE sites at the present time. Accordingly, DOE is retaining the 30 percent testing requirement in the final rule as proposed in the NOPR. DOE notes that a DOE contractor could impose a higher testing rate pursuant to 10 CFR 707.5, which states that nothing in 10 CFR part 707 is intended to prohibit any contractor subject to this part from implementing workplace substance abuse requirements additional to those of the baseline,

including drug testing employees and applicants for employment in any position and testing for any illegal drugs. However, the contractor is required to inform the appropriate Head of DOE Field Element of such additional requirements at least 30 days prior to implementation.

One commenter (Ex. 1) stated that the Department must add additional stipulations for the return of a contractor employee who was removed from a DOE site for the use of illegal drugs, and that their approval to return to a TDP (which necessitates a security clearance) should be conditioned on increased testing on their return. The commenter believed this would increase the likelihood that the Department would know about an individual's use of illegal drugs and refusal to comply with the Department's policies.

In response, DOE notes that when a contractor employee is removed from duty for use of illegal drugs, several conditions must be met under 10 CFR part 707 before the employee may be returned to a TDP. For example, 10 CFR 707.14(c)(1)-(3) provides that an employee may not be returned to a TDP unless the employee has successfully completed counseling or a program of rehabilitation; undergone a urine drug test with a negative result; and been evaluated by the site occupational medical department, which has determined that the individual is capable of safely returning to duty. Also, 10 CFR 707.14(b)(2) states that the failure to take the opportunity for rehabilitation, if it has been made available, for the use of illegal drugs, will require significant disciplinary action up to and including removal from employment under the DOE contract, in accordance with the contractor's policies. In addition, any employee who is twice determined to have used illegal drugs shall in all cases be removed from employment under the DOE contract. As an additional measure, 10 CFR 707.14(g) states that after an employee determined to have used illegal drugs has been returned to duty, the employee shall be subject to unannounced drug testing, at intervals, for a period of 12 months. In addition, in the final rule, 10 CFR 707.14(e) continues to provide that if a DOE access authorization is involved, DOE must be notified of a contractor's intent to return to a TDP an employee removed from such duty for use of illegal drugs. Therefore, DOE is amending the language in 10 CFR 707.14(e) as proposed in the NOPR.

List of Commenters

Exhibit Number	Company/Organization
1	Christian Ruano
2	Anonymous

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

This regulatory action has been determined not to be a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993). Accordingly, this action is not subject to review under that Executive order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

B. Review Under the National Environmental Policy Act of 1969

Pursuant to the National Environmental Policy Act of 1969 (NEPA), DOE has analyzed this action in accordance with NEPA and DOE's NEPA implementing regulations (10 CFR part 1021). DOE has determined that this final rule is covered by the Categorical Exclusion (CX) found in DOE's NEPA regulations at paragraph A5 of appendix A to subpart D, 10 CFR part 1021, because it is a rulemaking that interprets or amends an existing rule or regulation that does not change the environmental effect of the rule. *See* 10 CFR 1021.410. Therefore, DOE has determined that this final rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA and does not require an Environmental Assessment or an Environmental Impact Statement.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq*.) requires that an agency prepare a final regulatory flexibility analysis for any final rule where the agency was first required by law to publish a proposed rule for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)). As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website: *https://www.energy.gov/gc/office-general-counsel*.

This final rule updates DOE's regulations on workplace substance abuse programs for its contractor workers. This rule applies only to activities conducted by DOE's contractors. DOE expects that any potential economic impact of this rule on small businesses would be minimal because DOE contractors perform work under contracts with DOE or DOE prime contractors at a DOE site. DOE contractors are reimbursed through their contracts for the costs of complying with workplace substance abuse program requirements. They would not, therefore, be adversely impacted by the requirements in this final rule. For these reasons, DOE certifies that this final rule will not have a significant economic impact on a substantial number of small entities, and DOE has not prepared a regulatory flexibility analysis for this rulemaking.

D. Review Under the Paperwork Reduction Act of 1995

This final rule does not impose any new collection of information subject to review and approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq*.).

E. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires each Federal agency to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency regulation that may result in the expenditure by State, Tribal, or local governments, in the aggregate, or by the private sector, of $100 million in any one year (adjusted annually for inflation). Section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy (2 U.S.C. 1532(a)(b)). The Act also requires a Federal agency to develop an effective process to permit timely input by elected officials of State, Tribal, or local governments on a proposed "significant intergovernmental mandate," and requires an agency plan for giving notice and opportunity to provide timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. (62 FR 12820; also available at: *https://energy.gov/gc/office-general-counsel* under "Guidance & Opinions" (Rulemaking). DOE examined this final rule according to UMRA and its statement of policy and has determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year. Accordingly, no further assessment or analysis is required under UMRA.

F. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights" 53 FR 8859 (March 18, 1988), that this regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

G. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277), requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This final rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

H. Review Under Executive Order 13132

Executive Order 13132, "Federalism," (64 FR 43255 (August 4, 1999)) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this final rule and has determined that it would not preempt State law and will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

I. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, Section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide

a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires, among other things, that executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for the affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; (6) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies; and (7) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of the standards. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). Pursuant to OMB Memorandum M–19–15, Improving Implementation of the Information Quality Act (April 24, 2019), DOE published updated guidelines, which are available at: *www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf*.

DOE has reviewed this rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare, and submit to OMB, a Statement of Energy Effects for any significant energy action. A "significant energy action" is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1)(i) is a significant regulatory action under Executive Order 12866, or any successor order; and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the regulation be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

This regulatory action is not a significant regulatory action under Executive Order 12866. Moreover, DOE has concluded that this final rule will not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

L. Congressional Notification

As required by 5 U.S.C. 801(a)(1)(A), DOE will submit to Congress a report regarding the issuance of this final rule prior to the effective date set forth at the outset of this final rule. The report will state it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(2).

V. Approval by the Office of the Secretary of Energy

The Secretary of Energy has approved publication of this final rule.

List of Subjects in 10 CFR Part 707

Classified information, Drug testing, Employee assistance programs, Energy, Government contracts, Health and safety, National security, Reasonable suspicion, Special nuclear material, Substance abuse.

Signing Authority

This document of the Department of Energy was signed on July 27, 2022, by Jennifer Granholm, Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the *Federal Register*, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the *Federal Register*.

Signed in Washington, DC, on August 10, 2022.

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Treena V. Garrett
Federal Register Liaison Officer,
U.S. Department of Energy

For the reasons set out in the preamble, the Department of Energy amends part 707 of chapter III of Title 10 of the Code of Federal Regulations as set forth below:

PART 707—WORKPLACE SUBSTANCE ABUSE PROGRAMS AT DOE SITES

1. The authority citation for part 707 is revised to read as follows:

Authority: 41 U.S.C. 8102 *et seq*.; 42 U.S.C. 2012, 2013, 2051, 2061, 2165, 2201b, 2201i, and 2201p; 42 U.S.C. 5814 and 5815; 42 U.S.C. 7151, 7251, 7254, and 7256; 50 U.S.C. 2401 *et seq*.

2. Section 707.7 is amended by revising paragraphs (a)(2) and (b)(2)(iii) through (v) and adding paragraph (b)(2)(vi) to read as follows:

§707.7 Random drug testing requirements and identification of testing designated positions.

(a) * * *

(2) Programs developed under this part for positions identified in paragraphs (b)(2) and (3) of this section shall provide for random tests at a rate equal to 30 percent of the total number of employees in testing designated positions for each 12-month period. Employees in the positions identified in paragraph (b)(1) of this section and individuals identified in paragraph (c) of this section will be subject to random testing at a rate equal to 100 percent of the total number of employees or individuals, as applicable, identified, and those identified in paragraphs (b)(1) and (c) may be subject to additional drug tests.

(b) * * *

(2) * * *

(iii) Protective force personnel, exclusive of those covered in paragraph (b)(1) and (c) of this section, in positions involving use of firearms where the duties also require potential contact with, or proximity to, the public at large;

(iv) Personnel directly engaged in construction, maintenance, or operation of nuclear reactors;

(v) Personnel directly engaged in production, use, storage, transportation, or disposal of hazardous materials sufficient to cause significant harm to the environment or public health and safety; or

(vi) All other personnel in positions that require an access authorization (security clearance), other than those identified in paragraphs (b)(1) and (c) of this section.

* * * * *

3. Section 707.14 is amended by revising paragraph (e) to read as follows:

§707.14 Action pursuant to a determination of illegal drug use.

* * * * *

(e) If a DOE access authorization is involved, DOE must be notified of a contractor's intent to return to a testing designated position an employee removed from such duty for use of illegal drugs. Positions identified in §707.7(b)(1) of this part will require DOE approval prior to return to a testing designated position.

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